IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 528150

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY
ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA,

and

BRIEF IN SUPPORT OF PETITION.

WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No.

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY AND FRANK O'DONNELL, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

To the Honorable the Supreme Court of the United States and the several Justices thereof:

The petition of B. C. Lee shows as follows:

Petitioner, while employed by respondent, Central of Georgia Railway Company, and engaged in interstate commerce, was injured by the concurrent negligence of the two respondents against whom he brought his action in the city court of Savannah, Georgia.

His complaint showed upon its face that petitioner and

his employer were engaged in interstate commerce (p. 3 of record).

To this complaint respondent interposed demurrers upon the ground that there is no authority to join as defendants the railway company and one of its employees as an individual defendant under the Federal Liability Act (pp. 44, 45, 46 of record).

The same defense was sought to be set up by plea (pp. 9-11 of record).

The trial court overruled the demurrer and struck the plea (pp. 10, 12, 47 of record).

The case having been carried to the Court of Appeals of Georgia by writ of error, it, under instructions from the Supreme Court of Georgia, reversed the trial court, holding that because of the fact that petitioner and the railway company were engaged in interstate commerce there was a misjoinder of parties and a misjoinder of actions (p. 64 of record).

After final judgment of the trial court dismissing the case and of the judgment of the court of appeals affirming this judgment, and of the Supreme Court of Georgia denying a petition for certiorari (pp. 73, 74, and 75 of the record), petitioner now comes and prays for a writ of certiorari and says it should be granted for the following reasons:

1st. The decision is one of far-reaching importance. In basing its conclusion upon the following premise (p. 63 of record):

> "The Federal Employers' Liability Act imposes a duty upon the carrier, and this law is exclusive. All State laws which were applicable to such a case prior to the above enactment are suspended. This law, however, does not apply to the engineer. It is statutory and its applicability is limited by its own terms to interstate common carriers. As only common carriers are liable under the act, an individual or a corporation not a common carrier cannot be made a joint defendant. Nor can an employee of the defendant railroad company be joined with it as a defendant".

the court in effect held that the Federal Liability Act is so far exclusive as to suspend all other laws, giving an employee a right of action against other than his employer. It in effect holds that the Federal act destroys the common-law liability of other persons than the carrier for torts to an interstate employee.

2d. The decision of the Georgia court is of far-reaching effect in that it deprives the interstate employees of the right which all courts, including the courts of Georgia, accord to other litigants of joining as defendants in one action all tort feasors whose concurrent negligence have injured him.

A striking illustration of this inconsistency and injustice is found in the present record. The complaint is in two counts. The first is based upon the Federal act (p. 3 of record). The second is based upon the State liability act (p. 5 of record). No complaint of misjoinder was made or adjudicated as to the second count, so that if petitioner had been injured while engaged in intrastate commerce he might, without challenge, have maintained his action against both respondents.

3d. A certiorari should be granted because the decisions of the courts of various States are in conflict. The appellate courts of Georgia and the appellate courts of Minnesota are in unreconcilable conflict:

The Supreme Court of Georgia epitomizes its ruling as follows:

"An employee of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908 where concurring negligence

The Supreme Court of Minnesota in Doyle *vs.* St. P. Co. *et al.*, 159 N. W., 1081; 134 Minn., 461, epitomizes its finding as follows:

"A complaint against two defendants alleging that their concurrent negligence caused an injury to the plaintiff is good against a demurrer for misjoinder of causes, though the liability of one defendant rests upon

of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the safety appliance act of Congress."

the Federal Employers' Liability Act and that of the other upon the common law."

The practice of the Georgia courts with reference to persons other than interstate employees is epitomized in the opinion of the Court of Appeals of Georgia in Sou. Ry. *vs.* Miller, 1 Ga. App., 621, affirmed by this court in Sou. Ry. *vs.* Miller, 217 U. S., 209, and followed by the Supreme Court of Georgia in L. & N. R. R. *vs.* Roberts, 130 Ga., 271, as follows:

> "The proposition that the declaration contained a misjoinder of defendants because the liability of the railway company is statutory, and that of the other defendants is common-law liability, we do not think is meritorious. We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law. The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. The court's judgment is based on the liability of the defendant, whether statutory or common law, either one or both."

Because he was an interstate employee the courts of Georgia have refused to accord to petitioner the privilege they accord to other persons, and because of the far-reaching, as well as onerous effect of this decision, and the fact that this question has not heretofore been presented to this court, we submit this petition should be granted and the errors of the court below corrected.

WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1917.

No. ——

B. C. LEE, *Petitioner,*

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY ET AL., *Respondents.*

On Petition for Certiorari.

Brief and Argument of Counsel in Support of the Petition.

Statement of the Case.

Petitioner, while employed as a flagman and engaged in interstate commerce, was injured by the concurrent negligence of respondents. He brought a joint action against the master carrier and the servant engineer. His complaint was in two counts. In the first (see p. 3 of the record) it was alleged that he and the carrier were engaged in interstate service. This allegation was omitted from the second count (see p. 5 of the record). To this complaint defendants demurred upon the ground that there was in the first count a misjoinder of parties and actions (see demurrer of O'Donnell, pp. 44-45-46 of the record, and amendment to the demurrer of the company, p. 64 of the record, and amendment to demurrer of O'Donnell, p. 46 of the record), the same question was raised by answer. (See amendments to the answer of respondents, pp. 9-11 of the record). The trial court overruled the demurrers and struck the pleas. The case proceeded to trial and a verdict was returned for the plaintiff. A new trial was granted and the second trial re-

sulted in a verdict for petitioner. This was again set aside by the trial judge, and petitioner carried the case to the Court of Appeals by writ of error. That court certified two questions to the Supreme Court of Georgia (see p. 60 of the record). The first involved the question as to the constitutionality of a statute prohibiting the grant of a second new trial except for errors of law.

The second question was as follows:

> "May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer, under the Federal Employers' Liability Act of 1908 (U. S. Comp. St. 1916, 8657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (section 8605 *et seq.*) is charged against the carrier?"

To the first question propounded the Supreme Court answered that the record presented no question involving the constitutionality of the statute in question (see p. 62 of the record).

To the second inquiry the court answered:

> "An employe of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the Safety Appliance Act of Congress." (See p. 63 of the record).

The Court of Appeals in response to these questions reversed the trial court (see p. 64 of the record), and thereafter the trial court entered final judgment dismissing the cause. (See p. 73 of the record.) To this judgment of the

trial court petitioner sued out a writ of error to the Court of Appeals, which affirmed the judgment of the lower court (see p. 74 of the record.) Petitioner then applied to the Supreme Court of Georgia for a certiorari under the provisions of the Georgia constitution, which as amended (see p. 19, Georgia Laws 1916), provided as follows:

> "It shall also be competent for the Supreme Court to require by certiorari or otherwise any cause to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court."

This petition was denied (see p. 75 of the record).

The case now having the finality requisite under the case of Bruse, Administrator, *vs.* William Tobin, 245 U. S., p. 18, and the Court of Appeals being the highest court of the State to which an appeal lay within the contemplation of the statute as construed in Sullivan *vs.* Texas, 207 U. S., 416, petitioner has petitioned for a certiorari to the end that the error of the court below may be considered and corrected.

Questions to Be Determined.

Under the Georgia practice following that of the common law, an injured person may in one action sue all wrongdoers. But the Georgia courts have denied petitioner this right, because he was, when injured, an interstate employee, and this will involve the consideration of the following questions:

1. Is the Federal Employers' Liability Act of 1908 so far exclusive as to destroy the common law remedies of an interstate employee against persons other than his employer who have tortiously injured him?

2. Does the Federal Employers' Liability Act contain within itself, either directly or by implication, a prohibition against joining in one suit other persons than the carrier or master whose negligence concurred in injuring an interstate employee?

3. Whether the Supreme Court of Minnesota was right in holding that an interstate employee could join in one action all tort feasors including the carrier master, and whether the courts of Georgia were in error in holding the contrary.

4. Whether the questions involved are of sufficient importance to authorize the court to issue the writ of certiorari?

BRIEF.

Tort Feasors May Be Sued Jointly or Separately at the Election of the Person Injured.

It is an universal rule that a person who has been injured by the concurrent negligence of two or more wrongdoers may bring his suit against them jointly or severally.

Ruling Case Law Vol. 20 p. 678, states the rule as follows:

> "Joint tort feasors may be sued separately or jointly at the election of the party injured and in such a case the individual and a corporation may be joined as defendants."

In the note to the text many decisions of this and other Courts are cited.

This Court has stated the rule in Powers *vs.* Chesapeake Railroad 169 U. S. p. 92 as follows:

> "The action was brought against a railroad company, and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. It is well settled that a action of tort, which might have been

> brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several, which a plaintiff elects to make joint. * * * A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. This cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

In the early case of Brooks *vs.* Ashburn, 9 Ga., p. 298 (3), the Supreme Court of Georgia said:

> "Where an immediate act is done by the co-operation or the joint act of two or more persons they are all trespassers and may be sued jointly or severally, and any one of them is liable for the injury done by all."

Sutherland on Damages, Article 140, p. 432, says:

> "If injuries or damage are sustained through an affirmative act of negligence of several persons an action may be brought against all or any of them without prejudicing the plaintiff's rights."

9th Ency. of U. S. Rpts., pp. 53 and 57, quoting decisions of the Supreme Court of the United States, says:

> "A person who has suffered injury by the joint action of two or more wrongdoers may have his remedy against all or either, subject however to the condition that satisfaction once obtained is a bar to any other proceeding."

38 Cyc., 490, says:

> "In cases covered by the foregoing rule as generally stated the injured party may sue one, any or all of the joint tort feasors."

15 Ency. of Pleading and Practice, p. 557, says:

> "Where a tortious breach of duty is committed by two or more persons, each contributing to the injury as joint tort feasors, the plaintiff may at his election sue any one of them separately or he may sue all or any number of them jointly."

The general rule that all persons causing injury by their joint or concurrent negligence may be sued in one action prevails in Georgia.

The general rule is of force in Georgia. Brooks *vs.* Ashburn, 9 Ga., 298 (3); Page *vs.* Citizens Banking Co., 111 Ga., 73; Mashburn *vs.* Dannenburg Co., 117 Ga., 580; Constitution of Georgia, Code Sec. 6541; Central Ry. *vs.* Brown *et al.*, 113 Ga., 414; Sou Ry. *vs.* Grizzell, 124 Ga., 740; Cox *vs.* Strickland, 120 Ga., 104; Eining *vs.* Ga. Ry. Co., 133 Ga., 458 (2); Sou. Ry. *vs.* Cash, 131 Ga., 537; L. & N. R. R. *vs.* Roberts, 133 Ga., 270; Van Sant *vs.* Sou. Ry., 135 Ga., 444; Sou. Ry. *vs.* Miller, 1 Ga. App., 616; Finlay *vs.* Sou. Ry., 3 Ga. App., 722; A. C. L. Ry. *vs.* Bryant, 7 Ga. App., 703; Sou. Ry. *vs.* Sewell, 18 Ga. App., 544.

From the foregoing cases it will be seen that no distinction is made between the case of a servant suing a master and servant, and a case between a servant and persons occupying different relations, but in all cases the injured party may sue all persons whose acts concur in causing the injury. As said in the petition, the rule in Georgia is epitomized in the case of Sou. Ry. *vs.* Miller, 1 Ga. App., 621, where, after citing Alabama Great Sou. Ry. *vs.* Thompson, 200 U. S., 206; Ry. Co. *vs.* Dixon, 179 U. S., 131, it is said:

"The proposition that the declaration contained a misjoinder of defendants because the liability of the railway company is statutory, and that of the other defendants is common-law liability, we do not think is meritorious. We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law. The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. The court's judgment is based on the liability of the defendant, whether statutory or common law, either one or both."

The authority of this case cannot be questioned, as it was affirmed by this court in Sou. Ry. *vs.* Miller, 217 U. S., 209, followed by the Supreme Court of Georgia in L. & N. R. R. *vs.* Roberts, 136 Ga., 270, and by the Court of Appeals of Georgia in Sewall *vs.* Sou. Ry., 18 Ga. App., 544.

Because petitioner was an interstate employee the court below denied him the privilege it accords to other litigants.

It follows from the foregoing that if the petitioner had not been an interstate employee he might have brought his action against the respondents without challenge and that because he was an interstate employee he has been deprived of this privilege.

As stated in the petition the record of this case illustrates with sharp emphasis the distinction made between interstate and intrastate employees.

The first count of the complaint (p. 3 of the record) alleged petitioner and the carrier to have been engaged in interstate commerce, so that a cause of action was made out against the carrier under the Federal Liability Act and against the servant respondent under the common law. In the second count it is not alleged that the petitioner was engaged in interstate commerce so that under the second

count a cause of action was made out against the carrier under the State Liability Act and against the servant respondent under the common law.

Neither by demurrer nor plea was the second count attacked for misjoinder either of parties or actions, so that if the proof had shown him to have been engaged in intrastate commerce his recovery would have been sustained without a challenge from the respondents.

It necessarily follows that for the sole reason that he was an interstate employee petitioner has been denied privileges accorded to other persons, and this leads us to an examination of the reasons given by the court for so doing.

The conclusion of the court below that the Federal act is so far exclusive as to suspend the common-law liabilities between the servants of an interstate carrier is erroneous.

The court below seems to have evolved the theory that because plaintiff and both respondents were engaged in interstate commerce, the Federal Employers' Liability Act was so far exclusive as to suspend all laws relating to either of the three parties, so that the Federal Act is the sole measure of the rights of the interstate servant as to all persons engaged with him in interstate commerce.

We submit that the statute in question contains within its terms no justification for this position.

It is true that the statute does exclude the operation of all other laws as to liability of the carrier and all its interstate employees, but it does not assume to affect the relations between the servants of the carrier. Upon the contrary the duties and liabilities of the servants as between themselves remain the same as before.

At common law the servant was liable to third persons for any act of misfeasance. This rule governs the relation in Georgia. See Sou. Ry. *vs.* Miller, 1 Ga. App. 621, citing Osborne *vs.* Morgan, 130 Mass. 102, and Sou. Ry. *vs.* Grizzell,

124 Ga. 735-6. See also Sou. Ry. *vs.* Sewall, 18 Ga. App. 544, where the authorities are reviewed.

The effect of the judgment of the court below is to destroy this right of action which one servant has against another who has wrongfully injured him, and to relieve an interstate servant from all duties and liabilities to the other servants of the master.

The error of the court below in giving such construction to the statute is so obvious that it may be contended that the court did not so decide, but such contention can have no valid foundation.

It is established by the Georgia decisions that petitioner could have sued the respondents jointly had he been an intrastate employee. This is in effect conceded by the fact that no objection of misjoinder was made to the second count of the complaint. It being true that the Georgia courts permitted an intrastate employee to sue his carrier, the master and delinquent servant in the same action, and refused this privilege to an interstate employee, because of the exclusiveness of the Federal statute, it necessarily follows that its only justification for so holding upon the theory that the statute nullifies all laws relating to servants as well as the carriers who are engaged in interstate commerce.

The Federal statute does not deal with questions of practice. It deals alone with the liability of the master to the servant, so that the question of exclusiveness could have no relation to the form of action or the question of practice relating thereto.

In fact the questions propounded by the Court of Appeals and the answer of the Supreme Court indicate that both courts had in mind that the Federal statute alone could be looked to for the relations of any party, master or servant, engaged in interstate transportation. The Court of Appeals propounded the following question:

> "May an employee of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer under the Federal Em-

> ployers' Liability Act of 1908 (U. S. Comp St., 1916, 8657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (sec. 8605, *et seq.*) is charged against the carrier?"

Note the significance of the use of the words "*under* the Federal Employers' Liability Act" in both question and answer.

The Supreme Court answered as follows:

> "An employee of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the safety appliance act of Congress."

Note that the court, page 63 of the record, bases its conclusion upon the exclusiveness of the statute.

Under these considerations no other reasonable explanation can be given to the judgment of the court below, based as it was upon the exclusiveness of the Federal act, than that it deemed the Federal act to be so far exclusive as to suspend the common-law liability of the respondent servant.

It cannot be claimed that the court below was following a State practice: 1st. Because it gives only Federal reasons for its decision. 2d. The long line of authorities above cited contradicts such assertion. 3d. The fact that the second count of the petition which states facts calling into operation the State Employees Liability Act as to the master respondent, and the common law as to the servant respondent was not challenged for misjoinder, either of plaintiffs or defendants, attests the fact that the Federal grounds only were considered by the court below.

The court below erroneously construed the Federal statute by confusing the cause of action given to an injured employee with that given to an administrator for the homicide of an employee.

If it be possible that we are mistaken as to its attitude, and that the court below did not intend to hold that the Federal act was so far exclusive as to suspend the common-law liability of the servant respondent to petitioner, then it necessarily follows that it made just as serious and palpable a misconstruction of the Federal act by confusing the cause of action given by the statute to the administrator of a deceased employe in cases of homicide and the cause of action arising to an employee who has been injured, but not killed. This clearly appears from that portion of the opinion in which it cites the case of Western and Atlantic R. R. *vs.* Smith, 144 Ga., 737.

That was a case wherein parents of an intrastate servant sued the master carrier and another railroad for his homicide.

The Georgia Employers' Liability Act, Code, section 2782, (see page 24 herein), gives a cause of action to an injured employee against the carrier master, and in case of his homicide to his parents.

Under the Georgia Homicide Act, Code, section 4424 (see page 25 hereof), the cause of action against the Western and Atlantic Railroad which was not the master, was in the mother alone.

Under these conditions the court properly held there was a misjoinder of plaintiffs because the father had a right of action only against the employer railroad, and no right of action against the other, while the mother had a joint action with the father against the employer railroad and a sole right of action against the other railroad. For the same reason there was a misjoinder of defendants.

The citation of the case of W. & A. *vs.* Smith, indicates that the court confused the cause of action given to the ad-

ministrator in a case of homicide with a cause of action accruing to the employee in case of injury.

It is true that if petitioner had been killed and his administrator had sought to sue the carrier and servant respondents in the same action, there would have been a misjoinder of plaintiffs and defendants, just as there was in the case of W. & A. Railroad *vs.* Smith, because under the Federal act in cases of homicide the administrator has the cause of action, while under the State homicide act (Code, section 4424, page 25 hereof), which applies to the servant respondent, an administrator has no cause of action.

But in the present case the servant petitioner was injured, not killed.

Under the Federal act he had a cause of action against the master and under the common law he had a cause of action against the servant. In both cases the measure of damages was the same. The Federal act does not prescribe a measure of damage to an injured employee. It leaves that to be ascertained from the common law. The Federal act does not prescribe the duty of the master to its servant. The act leaves that to the common law which prescribes that ordinary care shall be used not to injure the servant. So that the plaintiff had a cause of action against both respondents for a breach of the same duties flowing from each and the same measure of damages as to each.

It is clear that the court below so far misconceived the Federal statute as to confuse the rule relating to a deceased employee with that relating to an injured employee.

Note that in the opinion (p. 63 of the record) the court below said:

> "In the case of W. & A. R. R. *vs.* Smith, 144 Ga. 737, this court decided that in a suit under the State law *an employee* (italics ours) of a railroad company could not join as defendants in the same action, the employer company and another railroad company."

This application of the cited case was wholly inaccurate, because the case of W. & A. R. R. *vs.* Smith was the case of the parents suing for a homicide of their son employee, while the case at bar is that of an injured employee suing for his injuries.

The cited case in stating the case it then had before it began by saying:

> "A *father and mother* (italics ours) instituted an action against two railroad companies for the homicide of their son * * * who had never been married, and upon whose estate there was no administration."

It will be noted that the Georgia Act is identical with the Federal Act except that in case of homicide the beneficiaries may sue where no administrator has been appointed and the measure of recovery is prescribed.

So it is evident that the court below entirely misconceived the purpose of the Federal statute and evolved the conception that under its terms the same rule applied to an injured employee which applies to his homicide.

Such a conclusion is so illogical that it can hardly be believed that an appellate court could so far misconceive the plain terms of the statute, but necessarily it is true either that the court below came to the conclusion that the Federal statute was so far exclusive as to embrace within its terms all the rights of an injured servant against all parties, even suspending the common-law liabilities of an offending co-servant, or that it so far misconceived the purport of the Federal statute as to confuse the cause of action given to an administrator of a deceased servant with the cause of action which inures to an injured servant. In either case the result of the decision is so novel and is of such far-reaching effect as to demand inquiry and correction by this court.

The conflict between the court below and the Supreme Court of Minnesota is irreconcilable.

We submit that the case of Doyle *vs.* St. Paul, 159 N. W., 1081; 134 Minn., 461, contains the true rule. The court there held in terms that there is no misjoinder where a plaintiff joins two defendants in one action, the liability of the one arising upon the Federal Employers' Liability Act and the other upon the common law.

The only difference between the Doyle case and the case at bar is that the master's co-defendant in the Doyle case was a corporation while in the case at bar the master's co-defendant was a servant, who, like petitioner, was engaged in interstate commerce.

In both cases the injured servant had a cause of action against each of the defendants, the measure of damages as to each being that prescribed by the common law and the measure of the duty required by each being prescribed by the common law.

The courts of Minnesota and Georgia are in unreconcilable conflict. The Minnesota courts accord to an interstate employee the same privileges they accord to other litigants, while in Georgia the interstate employee is denied the privilege accorded other litigants.

Surely this conflict should be corrected and the rule definitely laid down along the lines of the Minnesota case which is in harmony with all rules of pleading, ancient and modern.

Erroneous conception of the court below as to the import of the Federal statute.

The court below in conclusion (see pp. 63 and 64 of the record) argues as follows:

> "A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and injustice. Under

> our Civil Code, sec. 4513, 'if judgment is entered jointly against several trespassers and is paid off by one, the others shall be liable to him for contribution.' If the carrier and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered by each."

This we submit is an erroneous view of the duty of the court, an erroneous interpretation of the act, and affords no justification for the discrimination made against an interstate employee.

It is seen from the Miller case cited and quoted, page 5 hereof, and the case of L. & N. R. R. *vs.* Roberts, 136 Ga., 270, and Sou. Ry. *vs.* Miller, 217 U. S., 209, that these difficulties do not bar the right of an intrasate employee to sue his master and any number of servants in the same action.

This being true, there can be no justification for the discrimination here declared against the interstate employee.

The courts cannot decline jurisdiction of a case because of the difficulties attending the trial. This court in Mondou *vs.* N. Y., N. H. and Hartford R. R., 223 U. S., pp. 58 and 59, answering this argument said:

> "We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured per-

> son was a passenger, an employee or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."

Besides the difficulties referred to are not such as are recognized by courts. It has always been held that the fact that various defendant tort feasors having different defenses is no objection to their joinder in the same suit. (See quotation from Powers *vs.* Chesapeake, p. § hereof.)

See also A., G. S. R. R. *vs.* Thompson, 200 U. S., 218, where it is said:

> "The fact that by answer the defendant may show liability is several, cannot change the character of the case made by plaintiff in his pleading so as to effect the right of removal."

See also Sou. Ry. *vs.* Carson, 194 U. S., p. 139, where it is said:

> "A separate defense may defeat a joint recovery but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy; and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

Emphasis is laid by the court below upon the fact that the jury has no power to specify the particular damages to be recovered of each defendant; but it gives no reason why this fact should operate against the interstate employer and not against other persons.

In the Miller case, 217 U. S., 209, as well as other cases cited *supra*, the verdict was grounded against all defendants without reference to their degree of culpability, yet this court as well as the court below held that this fact furnished no cause for misjoinder, and we submit that the Federal

statute affords no just cause for this discrimination against an inter-state employee.

The fact that a jury cannot apportion, but must render a round verdict is the settled law as to all tort feasors whenever the same has not been changed by statute and affords no ground of misjoinder. Cooley on Torts, 2nd Ed., p. 153, states the proposition as follows:

> "Wrongs Intended.—When several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all. To require the party injured to ascertain and point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would, in many cases, be equivalent to a practical denial of justice. The law does not require this, but on the other hand, permits the party injured to treat all concerned in the injury as constituting together one party, by their joint co-operation accomplishing certain injurious results and liable to respond to him in a gross sum as damages."

In 28 Am. & Eng. Ency. of Law p. 570 it is said that where wrongdoers are sued jointly, it is the universal rule that the verdict must be in one sum. It must be against all for the highest damage done by one.

In 38 Cyc. p. 492 it is said:

> "Damages may be assessed in a single sum. They cannot be apportioned by the jury among defendants, for the sole inquiry open is what damages plaintiff has sustained, not who ought to pay them. Discrimination according to the relative enormity of the acts

> of each is not permitted. Should the jury assess different amounts, plaintiff should have judgment against all convicted for the largest sum found against anyone of them, for where no punitive damages are claimed, plaintiff is entitled to a joint verdict, for what the most culpable ought to pay."

We submit that the Court below made a wholly erroneous construction of the Federal Liability Act. Under that act the measure of damages is that prescribed by the common law. The Act gives the right to recover damages, but leaves the measure of damages to be ascertained from the common law. As the action against the servant arose from the common law it follows that the measure of damage was the same as to both.

Likewise the Federal Act does not undertake to prescribe the duty of the carrier employee to its servant, but leaves the measure of duty to be ascertained from the common law; as the action against the servant arose from the common law it follows that the measure of his duty to the plaintiff was the same as the carrier.

So that the court below was erroneous in its conclusion that there were different measures of damages and different duties from the respective defendants.

It is true that the Federal Act restricts the carriers' defenses of contributory negligence and assumption of risk, but these are purely defensive matters, and as seen from the cases of Chesapeake R. R. vs. Powers, 169 U. S., 92; Sou. Ry. *vs.* Carson, 194 U. S., 139; A. G. S. Ry. *vs.* Thompson, 200 U. S., 218, it is no cause of misjoinder that different defendants have different defenses.

The case of Sou. Ry. *vs.* Carson, 194 U. S., 136, is decisive of this question.

In that case Carson brought his action against the carrier master and negligent servants. One of the specifications of negligence was that one of the automatic couplers "was not in proper condition which rendered it necessary for

plaintiff to go between the cars to effect the coupling, and that the accident thereupon happened by reason of defendants' joint and concurrent negligence, carelessness, recklessness, etc., in particulars detailed."

In the Carson case under the Safety Appliance Act the carrier defendant was deprived of the defense of assumption of risk. The other defendants could make this defense. This court held that the defendants were properly joined and that the parties defendant were deprived of no Federal right by reason of this joinder, and that this was true even though a round verdict was rendered and the master could not call on the servants for contribution.

For all the foregoing reasons we submit there is no justification for the interpretation placed upon the Federal Liability Act by the court below.

Conclusion.

We submit that an interstate employee has the right when injured to sue in State courts upon the same equality as an intrastate servant and that the court below deprived petitioner of a valuable Federal right in the discrimination practiced against him, and because of this error of the court below, its far-reaching effect, its novelty, and its conflict with the decision of the Supreme Court of Minnesota and the principles of the common law, we submit that the certiorari should be granted.

Respectfully submitted,

WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
Attorneys for Petitioner.

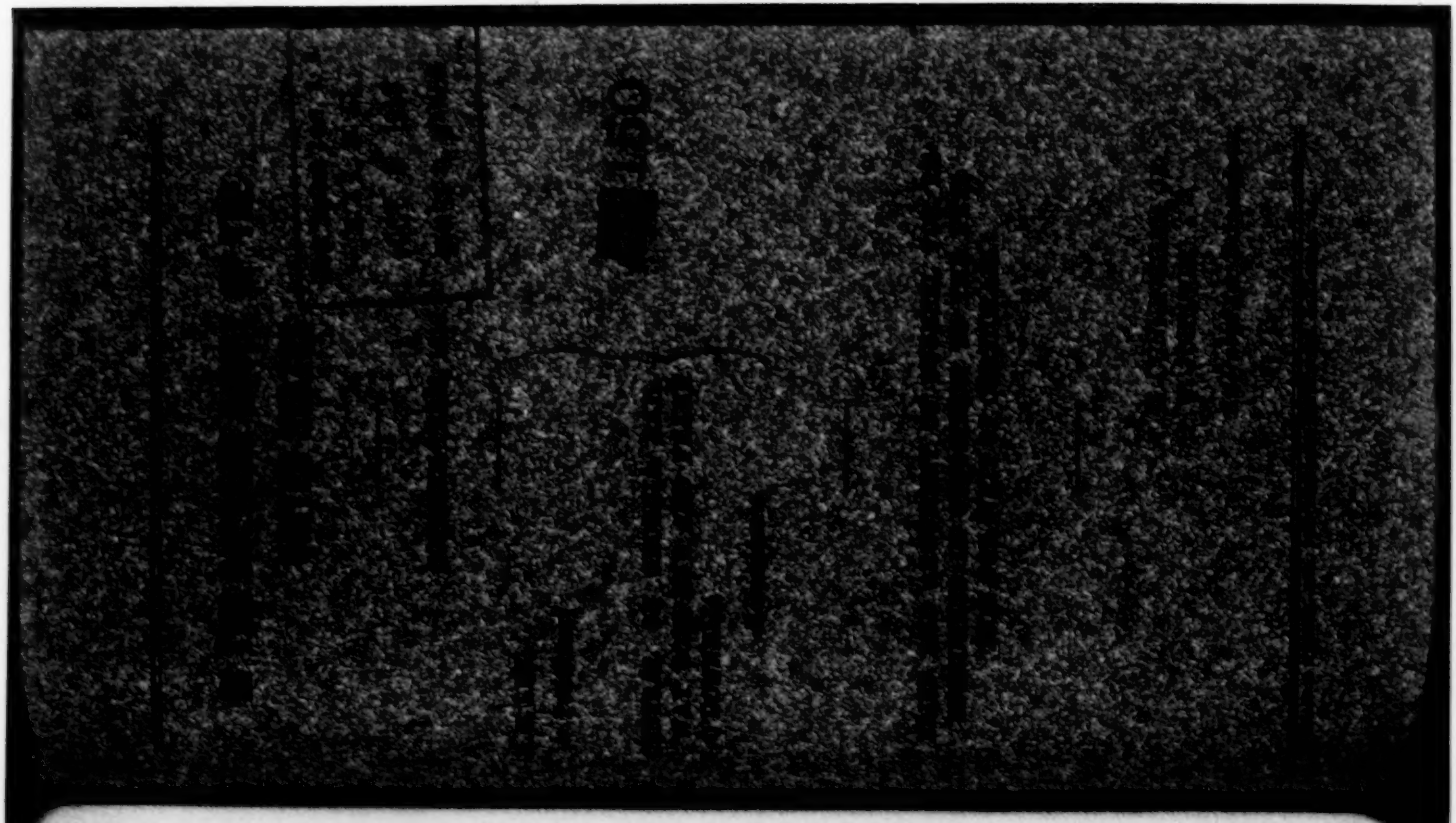
APPENDIX.

"2728. Injury by Coemployee.—Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband or child, or children of such employee, and if none then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment: *Provided*, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care could have avoided the consequences of the defendant's negligence. The measure of damage in case the injury results in death of the employee shall be that prescribed in sections 4424 and 4425; *Provided*, that the party or parties for whose benefit recovery may be had under this and the five succeeding sections may sue and recover in their own name or names in the manner prescribed by section 4424, in case no administration or executor has been appointed at the time suit is filed. In case death results from injury to the employee, the employer shall be liable unless it make it appear that it, its agents, and employees have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the employer. If death does not result from the injury, the presumption of negligence

shall be and remain as now provided by law in case of injury received by an employee in the service of a railroad company."

This section was codified from Georgia Acts, 1909, p. 100. The balance of the Georgia Statute as codified is a substantial copy of the Federal Employers' Liability Act.

"4424. Recovery of Homicide When.—A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child."



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

B. C. LEE,
Petitioner,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY AND FRANK O'DONNELL,
Respondents.

No. 528

BRIEF AND ARGUMENT OF COUNSEL FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

In an action under the Federal Employers Liability Act the plaintiff seeks to maintain a **joint liability** against the Railway Company and O'Donnell, its engineer, as joint trespassers under the following provision of Sec. 4512 of the Civil Code of Georgia of 1910:

> "Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either. * * *."

It was sought to hold the Railway Company liable under the Act of Congress and the individual defendant under the Georgia law. It was also alleged that the Railway Company was guilty of a violation of the Safety Appliance Act of Congress which contributed to the plaintiff's injury. The Court of Appeals of the State of Georgia, under instructions from the Supreme Court of the State, held that there was a misjoinder of parties and of causes of action. Plaintiff refused to amend in order to avoid this misjoinder, and the case was dismissed upon demurrer.

Lee vs. Central of Georgia Ry. Co., et al., 147 Ga., 428;
s. c. (Ga. App.) 94 S. E. Rep., 888;
s. c. (Ga. App.) 95 S. E. Rep., 718.
(Record, pp. 62, 64, 74.)

Whether this ruling of the State Court operated as a denial of a right or immunity to which the plaintiff was entitled under the Federal Act is the only question for consideration of this Court.

I.

The State Court properly held that an action against the Railway Company and its engineer as joint trespassers can not be maintained under the Federal Employers Liability Act.

A joint liability of the common carrier with others who may be sued as joint tort feasors is manifestly inconsistent with the scope and purpose of the Federal Act. Under the decisions of this Court it can not now be doubted that by this act Congress has taken complete charge of the subject matter of the liability of common carriers by railroads engaged in interstate commerce to their employes injured or

killed while employed in such commerce; that the Act is paramount and supersedes all State legislation on the subject; that it can not be supplemented or pieced out by the laws of a State; and that the Act is exclusive in its operation, not merely cumulative.

In the case of Michigan Central Railroad vs. Vreeland, ~~227~~ 227 U. S. 59, it was said:

> "A federal statute upon a subject exclusively under federal control must be construed by itself and can not be pieced out by State legislation. If a liability does not exist under the Employers Liability Act of 1908, it does not exist by virtue of any State legislation on the subject."

In the case of Seaboard Air Line Railway vs. Kenny, 240 U. S., 489, 493, this Court said:

> "There can be now no question that the Act of Congress insofar as it deals with the subjects to which it relates, is paramount and exclusive. It is therefore not disputable that recovery under the Act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action."

In a recent case this Court held:

> "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employes while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers Liability Act; Congress having thus fully covered the subject no room exists

for State regulation, even in respect of injuries occurring without fault as to which the Federal Act provides no remedy."

N. Y. Central R. Co. vs. Winfield, 244 U. S., 147.

It is certain that a **joint liability,** such as the plaintiff seeks to impose in this case, does not exist under the terms of the Employers Liability Act, and therefore such joint liability can not exist or be authorized by virtue of any State statute in a case where the Federal Act applies. This national statute provides only for liability of "every common carrier by railroad." It does not create liability against co-employes, nor does it provide for liability as in cases of joint trespassers. In the case of New York Central Railroad vs. Winfield, supra, this Court referred to and quoted the report of the House Committee having in charge the bill as showing its purpose to "withdraw all injuries to railroad employes in interstate commerce from the operation of varying State laws and to apply to them a national law having a uniform operation throughout all the States." It was further said in the same case that "there are weighty considerations why the controlling law should be uniform and not change at every State line." (N. Y. C. R. R. vs. Winfield, 244 U. S. 147, 149, 150).

Having in view the effect and operation of the Federal Employers Liability Act and its object and purpose as declared in numerous decisions by this Court, it is manifest that the Supreme Court of Georgia correctly answered the question submitted by the State Court of Appeals, to the effect that there could not be a joinder of the defendants in this case. It is plainly evident that if the constitution or statutes of a State could be thus invoked to create a **joint liability** against several defendants in a case arising under the Federal Act, then the exclusive right to regulate the liability of an interstate employer to its employes, which

Congress intended by the passage of the Act, would be wholly lost. In actions against the interstate employer and other joint defendants the regulation as well as the measure of such liability would be absolutely controlled by the various State statutes, because the liability of joint trespassers or tort feasors is measured and regulated by State laws which in Georgia, as in most of the other States, provide that each joint trespasser defendant may be held liable for the greatest injury done by the most culpable.

Simpson vs. Perry, 9 Ga., 508, 509;
Washington Gas Light Co. vs. Lansden, 172 U. S., 534, 552.

The attempted joinder of the defendant in this action is necessarily based on the statute of the State which authorizes suits against joint trespassers. It is clear that if a State may authorize a suit against a common carrier by railroad subject to this Act as one of several joint tort feasors, and provide for and fix the liability of the joint defendants *inter sese*, as the Georgia statute does (Sec. 4512, Code of Georgia of 1910), then necessarily the liability of the railway company will be measured by the terms of the State law and not by the Act of Congress, for the liability of one is the liability of all the others against whom the verdict is rendered. That portion of this Georgia statute which authorizes the jury to specify the particular damage to be recovered of each defendant does not apply to personal torts. The jury trying the case at bar could not apportion damages between the defendants, but were required to return a verdict for one amount jointly against both defendants. (Hunter vs. Wakefield, 97 Ga., 543; Hay vs. Collins, 118 Ga., 243; Lee vs. C. of Ga. Ry., et al. 147 Ga., 428). A joint judgment based upon a single verdict against defendants as joint tort feasors is necessarily a judgment under the common or statute law of the State; it can not be founded upon anything else. It is the State law, not the Federal Act, that

provides for and fixes the joint liability of the defendants in actions against joint trespassers and renders each one liable for the damages done by all who are found guilty in any degree. To permit a recovery upon the joinder of a railroad with other defendants as joint tort feasors in cases to which the Federal Act applies would effectually nullify the declared purpose of this Act of Congress, which was to establish an exclusive remedy for the employe, and a uniform rule of liability for the employer; and would instead permit as many different remedies and rules of liability as the separate State legislatures might enact.

In the case of Seaboard Air Line Railway vs. Horton, 233 U. S., 492, it was held that the State legislature had no power to determine the effect of contributory negligence or assumption of risk in cases under the Federal Act, "since this would, in effect, relegate to State control two of the essential factors that determine the responsibility of the employer." If a State may not control any of the essential factors that determine the responsibility of the employer, assuredly it may not control the entire result as it would do if it could authorize an action against the interstate employer as one of several joint tort feasors and permit the plaintiff to recover against all damages for the greatest injury done by either.

It is manifest that if it be legal to join as a tort feasor with the employer one of the co-employes of the plaintiff, it would be legal to join any one or more third persons, either individuals or corporations, whose concurrent negligence contributed to the injury. It is also manifest that if the Georgia statute may be applied to such cases, and the Federal employer made liable for the greatest injury done by any of its co-defendants, different rules of liability may be established under the statutes of the several States. It is not difficult to imagine the many "factors" arising out of State laws which would in such procedure determine the

right of the employe and measure the liability of the interstate employer, so that the declared purpose of the Act would by this means be entirely destroyed. It is certain that the terms of the Federal Act do not authorize such joinder of defendants, and its object and purpose exclude any implication that it may be done.

There are many instances of collisions at grade crossings between the trains of separate railroads. In such cases, the liability of the employer to its injured employe engaged in interstate commerce would depend not upon its own negligence alone, but also upon the negligence, however culpable, of the other railroad and its servants—if it be legally true that a plaintiff may rightfully join his employer in an action under the Federal Act with other defendants and obtain against all a single judgment "for the greatest injury done by either."

If in lieu of the general State statute regarding joinder and liability of joint trespassers as contained in the Georgia Code, Sec. 4512, which the plaintiff invokes to uphold a joint liability in this case, the State legislature should adopt an act to the same effect, but applicable by its terms to interstate employers so that, for instance, the law would read—

> Where a common carrier by railroad engaged in interstate commerce is one of several trespassers who are sued jointly by its employe engaged in such commerce, the plaintiff may recover against all damages for the greatest injury done by either,—

could any one contend that it would be competent for the State to pass such a statute, or that the joint liability and judgment, for which plaintiff insists, could be maintained thereunder? Certainly not; and yet the plaintiff in the case at bar invokes the general law of the State regarding

joinder and joint liability of tort feasors to do that which it must be conceded could not be done by specific State legislation. If the joinder and joint liability for which the plaintiff contends could not be accomplished directly by State legislation, it certainly can not be secured indirectly through a general statute of the State.

Cases which hold that there can not be a joinder of tort feasors under the Federal Employers Liability Act, because by its terms liability thereunder is limited to common carriers engaged in interstate commerce, are:

Kelly's Administrators vs. C. & O. Ry., et al., 201 Fed. 602;

Thompson vs. C. N. O. & T. P. Ry., et al., (Ky.), 176 S. W. Rep., 1006 (2).

See also:

Taylor vs. Sou. Ry. Co., 178 Fed. 380;

Richey Fed. Em. L. Act (2d Ed.) Sec. 128 and authorities cited.

The Supreme Court of the State in the case at bar referred to the "confusion and injustice" which would result if joinder of the employer and the co-employe as joint trespassers was allowed. This confusion and injustice is emphasized on consideration of section 3 of the Federal Employers Liability Act which provides that "the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employe, provided, however, that no employe shall be held to have been guilty of contributory negligence in any case where the violation by the carrier of a statute enacted for the safety of employes contributed to the injury." The question naturally arises, how would it be possible to have a verdict and judgment based upon the

comparative negligence of the employe and employer alone where the latter is joined as one of several tort feasors, and a single verdict and joint judgment is rendered "for the greatest injury done by either" of the defendants? That is the language of the Georgia statute which authorizes suits against joint trespassers on which the attempted joinder of the defendant in this case is based. (Code of Georgia of 1910, Sec. 4512).

Again, this "confusion and injustice" is especially apparent in regard to the individual co-defendant where there is a violation by the defendant railway company of the Safety Appliance Act of Congress as alleged in the present case. The individual defendant had no duty or obligation in regard to the maintenance of the safety appliance, but his co-defendant, the railway company, had, and if a failure to comply with the Safety Appliance Act contributed to the injury in any respect, whether the failure was due to negligence on the part of the railway company or not, the individual defendant is made liable with the railway company for the whole damage if they are suable as joint trespassers.

> "Disregard of the Safety Appliance Act is a wrongful act; and where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover damages from the party in default is implied."
>
> Texas & Pac. Ry. Co. vs. Rigsby, 241 U. S. 33 (1).

The railway company is denied the right to plead contributory negligence or assumption of risk on the part of the injured employe in such cases, and hence the individual co-defendant is thereby effectively cut off from any defense of contributory negligence on the part of the plaintiff, because under the Georgia law "where several trespassers are

sued jointly the plaintiff may recover against all damages for the greatest injury done by either." As the Supreme Court of Georgia said in this case:

> "If the carrier and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damage to be recovered of each, since Civil Code, Sec. 4512 is not applicable to personal torts."

Lee vs. Central of Ga. Ry. Co., et al., 147 Ga., 428, 431;
94 S. E. Rep., 558, 560.

II.

Plaintiff has not been deprived of any Federal right or privilege; nor does this case involve any construction of the Federal Employers Liability Act.

It is apparent that plaintiff has not been denied any right or privilege accruing to him under the Federal statute and that there is nothing to justify this Court in granting the writ of certiorari. The case does not involve a construction of the Federal Employers Liability Act. It is only in matters involving a **construction** of the Act that this Court will review the judgment of a State Court in an action thereunder.

Central Vermont Ry. vs. White, 238 U. S., 507 (2);
Seaboard Air Line Ry. vs. Duvall, 225 U. S., 477, 486.

Plaintiff contends that the Georgia Supreme Court erred in holding that the Federal Employers Liability Act is so far exclusive as to deprive him of his remedies against other persons. But we respectfully submit that the Supreme Court of Georgia did not so hold. The plaintiff has not been prevented from asserting any separate remedy or right of action against either defendant; he has simply been prevented from obtaining a **joint judgment** against both defendants in one action—a remedy which it is certain the Federal Act does not in terms convey, but which, on the contrary, if allowed, is destructive of its primary purpose.

It is apparent that the State Supreme Court ruled that **the joinder of defendants was not permissible under the State practice and procedure without regard to the Federal statute.** The Georgia Supreme Court cited in the case at bar its own previous decision, Western & Atlantic R. R. vs. Smith, 144 Ga., 737, an action based upon the State Liability Act, in which that Court had held that the employer could not be joined as a defendant with one who was not the employer. The Court of Appeals was instructed by the State Supreme Court in the present case, that to "join defendants in one suit they must owe the same duty," and that "where there is no joint duty there can be no joinder." This was said quite apart from any consideration of the Federal Employers Liability Act. Under the Georgia law the Court of Appeals is bound by the decisions and instructions of the Supreme Court of the State (Article VI, Sec. 2, Par. 9, Constitution of the State of Georgia, as amended by Acts of 1916, pp. 19, 20; Sec. 6506, Parks Annotated Code of Georgia, 1917 Supplement).

The decision of the State Supreme Court, so far at least as any joint action against the individual defendant is concerned, is final and conclusive on this question, since the Federal Employers Liability Act does not expressly or impliedly give an injured employe any right of action against

his co-employe. The attempted joinder of the defendant O'Donnell in this case involves his rights and defenses as well as those of the interstate railroad carrier. Would it be competent for this Court, even if it should entertain a different view from the State Supreme Court, to reverse the judgment below with direction which would have the effect to subject the individual defendant to a **joint judgment** with the railway company? The co-employe is not made liable either jointly or severally to the injured employe under the Federal Act. How then would it be competent for this Court to declare, in opposition to the decision of the State Supreme Court, that he should have been **jointly bound** with the railway company in this action?

In the improbable event that this Court should now conclude that the employer might be joined with one or several joint trespassers in an action under the National statute—that a **joint liability** of the Federal employer with co-trespassers "for the greatest injury done by either" is consistent with the object and purpose of the Federal Employers Liability Act—even so, under the State practice as declared by the Supreme Court of Georgia, it would still not be permissible for the plaintiff to subject the other co-defendant to a joint judgment in this State Court action. Since the Federal statute does not require or authorize such joinder it is clear that the question of misjoinder, **as to the individual defendant at least,** is a matter of State pleading and practice on which the decision of the State Supreme Court is binding upon this Court.

> Central Vermont Ry. Co. vs. White, 238 U. S., 507, 513.

In a case which did not involve the Federal Employers Liability Act, this Court said:

"Whether there was a joint liability of defendants sued jointly for negligence is a matter of State law and this Court will not go behind the decision of the highest Court of the State to which the question can go."

C. R. I. & P. Ry. vs. Schwyhart, 227 U. S., 184 (1).

"Where the judgment of the State Court rests on a matter of general law strong enough to sustain the judgment, this Court can not consider the Federal question involved; even if it were actually considered by the State Court and determined adversely to plaintiff in error."

Gaar, Scott & Co. vs. Shannon, 223 U. S., 468 (1).

The State Court may not refuse to entertain an action against the employer under the Federal Act, but certainly it may decline to permit that which the Federal Act itself does not authorize, the joinder of the employer with one who does not sustain that relation to the plaintiff.

In support of their argument that the decision of the State Court operates as a discrimination against the interstate employe, counsel for petitioner say:

"A striking illustration of this inconsistency and injustice is found in the present record. The complaint is in two counts. The first is based upon the Federal Act (p. 3 of record). The second is based upon the State Liability Act (p. 5 of record). No complaint of misjoinder was made or adjudicated as to the second count, so that if petitioner had been injured while engaged in intrastate commerce he might, without challenge, have maintained his action against both respondents" (p. 3, brief in support of petition).

Reference to the record will show that this statement is entirely erroneous. Both defendants demurred to the whole petition (which included the two counts) for misjoinder of parties defendant. (See par. 3 of the railway company's demurrer, record, p. 43, and par. 4 of O'Donnell's demurrer, record, p. 45). On the trial plaintiff expressly abandoned the second count of the petition which was based on the State law (see recital in charge of the Court, record, p. 52; specification 1 in bill of exceptions, record, p. 70; opinion of Court of Appeals, record, p. 65); therefore the Court of Appeals could not and did not in this case pass upon the question of misjoinder of defendants under the second count. The case was tried in the lower Court and decided in the Court of Appeals, solely upon the first count of the petition which was based upon the Federal Act. But if the Appellate Court had considered the demurrer in relation to the second count there can be no doubt that it would have held there was a misjoinder of defendants, as it did in a prior case under the State Liability Act.

W. & A. R. R. vs. Smith, supra.

Counsel for petitioner refer to the Minnesota case, Doyle vs. St. Paul Union Station Co., et al., 134 Minn., 461, 159 N. W., 1081, as being in conflict with the decision of the Georgia Court in the case at bar and urge this as a reason for granting the writ of certiorari. But the difference between the Minnesota practice and the Georgia practice renders any supposed conflict in these decisions of no importance. The Minnesota law provides that the jury may return a verdict in different amounts against the several defendants who are sued as joint trespassers. This is manifest from the following language of the Court in the Doyle case:

> "That the measure and amount of recovery against different defendants may be different, and in supposable cases they might be, is not important. If the de-

fendants are liable in different amount, their different liabilities can be found and declared. See Rauma vs. Lamont, 82 Minn., 477, 85 N. W., 236."

Ib., page 1082.

In the case at bar, on the contrary, the Georgia statute under which the joinder was made provides a directly opposite rule:

"Where several trespassers are sued jointly, the plaintiff may recover against all damages for the greatest injury done by either."

Ga. Civil Code of 1910, Sec. 4512.

Under the Georgia law the jury trying the case can not apportion the damages between the defendants in cases against joint trespassers. Lee vs. Central of Ga. Ry. Co., 147 Ga., 428, 431. The important distinction is, therefore, that a defendant Federal employer in a suit against it as one of several joint trespassers under the Georgia statute is bound to respond for damages for the greatest injury done by either one of its joint tort feasors, and the Federal Employers Liability Act, instead of being exclusive as Congress intended, is completely set aside by the State law. In other words, the Georgia statute, in measuring the damages against all the joint trespassers according to the greatest injury done by either, is the law which really governs the case and not the Federal Employers Liability Act which should, by reason of its supremacy, control the ultimate liability of the Federal employer.

For these reasons, it may be that in Minnesota a defendant employer liable under the Federal Act might be joined with other defendants and the verdict so apportioned between the defendants as not to affect the exclusive char-

acter of the National statute. However, this point was not presented or argued in the Minnesota case, but the Supreme Court of that State simply cited and followed its own decisions which adopted the general rule in regard to joinder of joint trespassers long before the passage of the Federal Employers Liability Act.

We submit that the decision of the Court of Appeals and of the Supreme Court of Georgia in this case was entirely right; that the petitioner has not been denied any right, privilege, or immunity under the Federal Act; and that there is nothing in this case which would justify the issuance of the writ of certiorari.

Respectfully submitted,

J. M. Cunningham

W. W. Johnson

Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

B. C. LEE,
Petitioner

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY, et al.,
Respondents.

No. 150

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF AND ARGUMENT OF COUNSEL FOR PLAINTIFF IN CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

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No. 150

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF AND ARGUMENT OF COUNSEL FOR PLAINTIFF IN CERTIORARI

STATEMENT OF THE CASE

Petitioner, while employed as a flagman and engaged in interstate commerce, was injured by the concurrent negligence of respondents. He brought a joint action against the master carrier and the servant engineer. His complaint was

in two counts. In the first (see p. 3 of the record) it was alleged that he and the carrier were engaged in interstate service. This allegation was omitted from the second count (see p. 5 of the record). To this complaint defendants demurred upon the ground that there was in the first count a misjoinder of parties and actions (see demurrers of O'Donnell, pp. 44-45-46 of the record, and amendment to the demurrer of the company, p. 64 of the record, and amendment to demurrer of O'Donnell, p. 46 of the record). The same question was raised by answer. (See amendments to the answer of respondents, pp. 9-11 of the record). The trial Court overruled the demurrers and struck the pleas. The case proceeded to trial and a verdict was returned for the plaintiff. A new trial was granted and the second trial resulted in a verdict for petitioner. This was again set aside by the trial judge, and petitioner carried the case to the Court of Appeals by writ of error. That Court certified two questions to the Supreme Court of Georgia (see p. 60 of the record). The first involved the question as to the constitutionality of a statute prohibiting the grant of a second new trial except for errors of law.

The second question was as follows:

> "May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908 (U. S. Comp. St., 1916, 8657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (section 8605 et seq.) is charged against the carrier?"

To the first question propounded the Supreme Court answered that the record presented no question involving the constitutionality of the statute in question (see p. 62 of the record).

To the second inquiry the Court answered:

> "An employe of a railway company engaged in interstate commerce cannot maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the Safety Appliance Act of Congress." (See p. 63 of the record).

The Court of Appeals complying with these instructions reversed the trial Court (see p. 64 of the record) and thereafter the trial Court entered final judgment dismissing the cause (see p. 73 of the record). To this judgment of the trial Court petitioner sued out a writ of error to the Court of Appeals, which affirmed the judgment of the lower Court (see p. 74 of the record). Petitioner then applied to the Supreme Court of Georgia for a certiorari under the provisions of the Georgia constitution, which as amended (see p. 19 Georgia Laws, 1916), provided as follows:

> "It shall be competent for the Supreme Court to require, by certiorari or otherwise, any cause to be certified to the Supreme Court from the Court of Appeals for review and determination with the same power and authority as if the case had been carried by writ of error to the Supreme Court."

This petition was denied (see p. 75 of the record).

The case now having the finality requisite under the case of Bruse, Administrator vs. William Tobin, 245 U. S., p. 18, and the Court of Appeals being the highest court of the State to which an appeal lay within the contemplation of the statute as construed in Sullivan vs. Texas, 207 U. S., 416, petitioner applied for a certiorari which was granted.

QUESTIONS TO BE DETERMINED

Under the Georgia practice following that of the common law, an injured person may in one action sue all wrong doers. But the Georgia courts have denied petitioner this right, because he was, when injured, an interstate employee, and this will involve the consideration of the following questions:

1. Is the Federal Employers' Liability Act of 1908 so far exclusive as to destroy the common law remedies of an interstate employe against persons other than his employer who have tortiously injured him?

2. Does the Federal Employers' Liability Act contain within itself, either directly or by implication, a prohibition against joining in one suit other persons than the carrier or master whose negligence concurred in injuring an interstate employe?

BRIEF

TORT FEASORS MAY BE SUED JOINTLY OR SEPARATELY AT THE ELECTION OF THE PERSON INJURED.

It is an universal rule that a person who has been injured by the concurrent negligence of two or more wrongdoers may bring his suit against them jointly or severally.

Ruling Case Law Vol. 20, p. 678, states the rule as follows:

> "Joint tort feasors may be sued separately or jointly at the election of the party injured and in such a case the individual and a corporation may be joined as defendants."

In the note to the text many decisions of this and other Courts are cited.

This Court has stated the rule in Powers vs. Chesapeake Railroad, 169 U. S., p. 92, as follows:

> "The action was brought against a railroad company, and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State Court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this Court has often said, 'a defendant has no right to say that an action shall be several, which a plaintiff elects to make joint * * * A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. This cause of action is the subject matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings'."

In the early case of Brooks vs. Ashburn, 9 Ga., p. 298 (3) the Supreme Court of Georgia said:

> "Where an immediate act is done by the co-operation or the joint act of two or more persons they are all trespassers and may be sued jointly or severally and any one of them is liable for the injury done by all."

Sutherland on Damages, Article 140, p. 432, says:

> "If injuries or damages are sustained through an affirmative act of negligence of several persons an action may be brought against all or any of them without prejudicing the plaintiff's right."

Ninth Ency. of U. S. Rpts., pp. 53 and 57, citing decisions of the Supreme Court of the United States, says:

> "A person who has suffered injury by the joint action of two or more wrongdoers may have his remedy against all or either, subject, however, to the conditions that satisfaction once obtained is a bar to any other proceedings."

Thirty-eighth Cyc. 490 says:

> "In cases covered by the foregoing rule as generally stated the injured party may sue one, any or all of the joint tort feasors."

Fifteenth Ency. of Pleading and Practice, p. 557, says:

> "Where a tortious breach of duty is committed by two or more persons, each contributing to the injury as joint tort feasors, the plaintiff may at his election sue any one of them separately or he may sue all or any number of them jointly."

IT IS NOT NECESSARY THAT THERE BE CONCERT OF ACTION—IF INDEPENDENT ACTS COMBINE TO PRODUCE THE RESULT THEN ALL ARE LIABLE.

Where though concert is lacking, the separate and independent acts of negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.

38 Cyc., 488 (f).

Several persons acting independently but causing together a single injury are joint tort feasors within the rule, and may be sued either jointly or severally. In other words, it is not always essential that defendants shall have acted in concert in order to render them liable as joint tort feasors.

15 Ency. P. & P., 558.

Where the injury is the result of concurring negligence of two or more parties they may be sued jointly or severally. All may be sued jointly notwithstanding different degrees of care—may be owed by the different defendants.

29 Cyc., 564, 565 b., "defendants."

Joint negligence exists where two or more persons are jointly concerned in the negligence causing the injury. They may be thus concerned by their co-operating or acting together, or by being joint enterprisers, engaged in a common enterprise. The definition of joint tort feasors applies. Concurrent, as distinguished from joint negligence, arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently. That the negligence of another person than the defendant contributes, concurs, or co-operates to produce

the injury is of no consequence. Both are ordinarily liable. And unless **the damage** caused by each is clearly separable, permitting of distinct assignments of responsibility to each, each is liable for the entire damage. The degree of culpability is immaterial. And so when the injury is the result of the neglect to perform a common duty, **whether charged with joint or concurrent negligence all parties contributing to produce the injury by their responsible acts or omissions, may, at the option of the plaintiff be joined as defendants in the same action.**"

1 Sherman & Redfield Negligence, Sec. 122, pp. 317, 318, 319.

In a case in 242 Ill., 166; 89 N. E., 974, a stock yard company and a railroad were sued jointly by an employee of the railroad. Held: Several persons acting independently but causing together a single injury may be sued either jointly or severally, and the injured party may at his election sue any of them separately, or he may sue all or any number of them.

In Paducah Tr. Co. vs. Sine, 33 Ky. L., 792; 111 S. W., 356, plaintiff was a rear man on an ice delivery wagon. He was injured by a collision between the ice wagon and a street car, and sued the owner of the ice wagon and the street car company. Held, joint action properly brought.

In Sea Ins. Co. vs. Vicksburg, etc., Ry. Co., 159 Fed. 679, the following was held: "It is settled, seemingly, without dispute, that, if the concurrent **or successive negligence** of two persons result in an injury to a third person, he may recover damages of either or both, and neither can interpose the defense that the prior concurrent negligence of the other contributed to the injury."

In Clinger's Admrx. vs. C. & C. Ry., 33 Ky. L., 86; 109 S. W., 315. If an injury is inflicted by two or more wrongdoers an action may be maintained by the injured person either against one or against all of them, their liability being joint and several.

While several may be guilty of several distinct negligent acts, yet, if their concurrent effect is to produce an actionable injury, they are all liable therefor. The action not being to recover for the negligent act or acts but for the injury which they produce.

In McFadden vs. Met. St. Ry., 161 Mo., 652; 143 S. W., 884: A passenger was injured in a collision between a public automobile and a street car. Held, that the passenger may sue the owner of both, the negligence of each concurring in causing the accident. The cause of action was joint and several.

In Coleman vs. Minn. St. R. Co., 133 Minn., 364; 129 N. W., 762: An employe was being driven in a motor vehicle by his employer. He had a collision with a street car. Negligence was alleged in the employer and the street car company. Held, that he may sue both.

In each of these cases there was a different duty owed by each of the defendants.

A case clearly in point is that of Geise vs. Mercer Bott. Co., 87 N. J. L., 224, 94 Atl., 24, cited in Babbitt on Motor Vehicles, Sect. 1048, as follows:

Where a traction Company negligently leaves a rut besides its track, and a truck driver negligently runs into it and loses control of his vehicle, his employer and the traction company are jointly liable to a pedestrian injured.

THE GENERAL RULE THAT ALL PERSONS CAUSING INJURY BY THEIR JOINT OR CONCURRENT NEGLIGENCE MAY BE SUED IN ONE ACTION PREVAILS IN GEORGIA.

The general rule is of force in Georgia. Brooks vs. Ashburn, 9 Ga., 298 (3); Page vs. Citizens Banking Co., 111 Ga., 73; Mashburn vs. Dannenburg Co., 117 Ga., 580; Constitution of Georgia, Code Sec. 6541; Central Ry. vs. Brown, et al., 113 Ga., 414; Sou. Ry. vs. Grizzell, 124 Ga., 740; Cox vs. Strickland, 120 Ga., 104; Eining vs. Ga. Ry. Co., 133 Ga., 458 (2); Sou. Ry. vs. Cash, 131 Ga., 537; L. & N. R. R. vs. Roberts, 136 Ga., 270; VanSant vs. Sou. Ry., 135 Ga., 444; Sou. Ry. vs. Miller, 1 Ga. App., 616; Finlay vs. Sou. Ry., 5 Ga. App., 722; A. C. L. Ry. vs. Bryant, 7 Ga. App., 703; Sou. Ry. vs. Sewell, 18 Ga. App., 544.

The case of L. & N. R. R. vs. Roberts supra following So. Ry. vs. Miller supra has special and controlling significance. It was decided by a unanimous bench.

Ga. Code, Sec. 6207, is as follows:

"6207. DECISION OF, HOW REVERSED: A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges or justices, cannot be reversed or materially changed except by the concurrence of at least five justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had, in which the decision, by permission of the Court, is expressly questioned and reviewed; and after such argument, the Court in its decision shall state distinctly whether it affirms, reverses or changes such decision."

The decision in the case at bar was decided by only four justices, one being disqualified and one absent. So the L. & N. case supra which was not reviewed has force and effect equivalent to a statute. In that case a passenger sued a railroad company and three of its servants. The liability of the railroad company was of statutory origin. The liability of the servants was of common law origin. The company defendant by statute owed the passenger extraordinary care. The servant defendants owed him under the common law ordinary care.

The negligence charged against the engineer and fireman was that they failed to keep a proper lookout. The negligence charged against the section boss was that he failed to keep up the track.

The Court by a unanimous decision following the case of So. Ry. vs. Miller, 1 App., 220, and the same case 217 U. S., 209 held that there was no misjoinder and no separable controversy.

Such being the rule of practice in Georgia it is unnecessary for us to notice the text of Richey on Federal liability based upon decisions involving the local practice in Kentucky or the case of Taylor vs. So. Ry. 178 Fed., 380, which is opposed to the Pederson case as to what is interstate service and involved only the question of separable controversy and not of misjoinder.

From the foregoing cases it will be seen that no distinction is made by the Courts of Georgia between the case of a servant suing a master and servant, and a case between a servant and person occupying different relations, but in all cases the injured party may sue all persons whose acts concur in causing the injury.

The rule in Georgia is epitomized in the case of Sou. Ry. vs. Miller, 1 Ga. App., 621, where, after citing Alabama Great Sou. Ry. vs. Thompson, 200 U. S., 206; Ry. Co. vs. Dixon, 179 U. S., 131, it is said:

> "The proposition that the declaration contained a misjoinder of defendants because the liability of the railway company is statutory, and that of the other defendants is common law liability, we do not think is meritorious. **We do not think it makes any difference whether the liability of one defendant arises from statute and the other from common law.** The practical question to be decided is, is there a liability, and are the defendants all liable? And the particular source from which the liability of each defendant emanates cannot be material. **The Court's judgment is based on the liability of the defendant, whether sattutory or common law, either one or both.**" (Italics ours.)

The authority of this case cannot be questioned, as it was affirmed by this Court in Sou. Ry. vs. Miller, 217 U. S., 209, followed by the Supreme Court of Georgia in L. & N. R. R. vs. Roberts, 136 Ga., 270, and by the Court of Appeals of Georgia in Sewall vs. Sou. Ry., 18 Ga. App., 544.

BECAUSE PETITIONER WAS AN INTERSTATE EMPLOYEE THE COURT BELOW DENIED HIM THE PRIVILEGE IT ACCORDS TO OTHER LITIGANTS

It follows from the foregoing that if the petitioner had not been an interstate employe he might have brought his action against the respondents without challenge and that because he was an interstate employe he has been deprived of this privilege.

The record of this case illustrates with sharp emphasis the distinction made by respondents and the Court below between interstate and intrastate employes.

The first count of the complaint (p. 3 of the record) alleged petitioner and the carrier to have been engaged in interstate commerce, so that a cause of action was made out against the carrier under the Federal Liability Act and against the servant respondent under the common law. In the second count it is not alleged that the carrier was engaged in interstate commerce so that under the second count a cause of action was made out against the carrier under the State Liability Act and against the servant respondent under the common law.

Neither by demurrer nor plea was the second count attacked for misjoinder either of parties or actions, so that if the proof had shown him to have been engaged in intrastate commerce his recovery would have been sustained without a challenge from the respondents.

It necessarily follows that for the sole reason that he was an interstate employe petitioner has been denied privileges accorded to other persons, and this leads us to an examination of the reasons given by the Court for so doing.

THE CONCLUSION OF THE COURT BELOW THAT THE FEDERAL ACT IS SO FAR EXCLUSIVE AS TO SUSPEND THE COMMON LAW LIABILITIES BETWEEN THE SERVANTS OF AN INTERSTATE CARRIER IS ERRONEOUS.

The Court below seems to have evolved the theory that because plaintiff and both respondents were engaged in interstate commerce, the Federal Employers' Liability Act was so far exclusive as to suspend all laws relating to either of the three parties, so that the Federal Act is the sole measure of the rights of the interstate servant as to all persons engaged with him in interstate commerce.

We submit that the statute in question contains within its terms no justification for this position.

It is true that the statute does exclude the operation of all other laws as to liability of the carrier between itself and all its interstate employes, but it does not assume to affect the relations between the servants of the carrier inter se-se. Upon the contrary the duties and liabilities of the servants as between themselves remain the same as before.

At common law the servant was liable to third persons whether co-servants or strangers for any act of misfeasance. This rule governs the relation in Georgia. See Sou. Ry. vs. Miller, 1 Ga. App., 621, citing Osborne vs. Morgan, 130 Mass, 102, and Sou. Ry. vs. Grazzell, 124 Ga., 735-6. See also Sou. Ry. vs. Sewall, 18 Ga. App., 544, where the authorities are reviewed.

The effect of the judgment of the Court below is to destroy this right of action which one servant has against another who has wrongfully injured him, and to relieve an interstate servant from all duties and liabilities to the other servant of the master.

The error of the Court below in giving such construction to the statute is so obvious that it may be contended that the Court did not so decide, but such contention can have no valid foundation.

It is established by the Georgia decisions that petitioner could have sued the respondents jointly had he been an intrastate employe. **This is in effect conceded** by the fact that no objection of misjoinder was made to the second count of the complaint. It being true that the Georgia Courts permitted an intrastate employe to sue his carrier master and delinquent servant in the same action, and refused this privilege to an interstate empolye, because of the exclusiveness of the Federal statute, it necessarily follows that its

only justification for so holding is upon the theory that the statute nullifies all laws relating to servants as well as the carriers who are engaged in interstate commerce.

The Federal statute does not deal with questions of practice. It deals alone with the liability of the master to the servant, so that the question of exclusiveness could have no relation to the form of action or the questions of practice relating thereto. Roberts Federal Liabilities of Carriers, Art. 670, p. 1167, same author, Art. 688, p. 1197, same author, Art. 698, p. 1219, et seq.

In fact the questions propounded by the Court of Appeals and the answer of the Supreme Court indicate that both courts had in mind that the Federal statute alone could be looked to for the relations of any party, master or servant, engaged in interstate transportation.

The Court of Appeals propounded the following question:

> "May an employe of a railway company engaged in interstate commerce maintain a joint action against the company and its engineer under the Federal Employers' Liability Act of 1908 (U. S. Comp. St., 1916, 1657-8665), where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury by the plaintiff, and where also a violation of the safety appliance act of Congress (Sec. 8605, et seq.) is charged against the carrier?"

Note the significance of the use of the words "under the Federal Employers' Liability Act" in both question and answer.

The Supreme Court answered as follows:

> "An employe of a railway company engaged in interstate commerce cannot maintain a joint action against the

company and its engineer under the Federal Employers' Liability Act of 1908, where concurring negligence of the interstate carrier and its engineer in the course of interstate commerce is alleged as the cause of the injury to the plaintiff. And this is true irrespective of any allegation as to a violation of the safety appliance act of Congress."

Note that the Court, page 63 of the record, based its conclusion upon the exclusiveness of the statute.

Under these considerations no other reasonable explanation can be given to the judgment of the Court below, based as it was upon the exclusiveness of the Federal Act, than that it deemed the Federal Act to be so far exclusive as to suspend the common-law liability of the respondent servant.

It cannot be claimed that the Court below was following a State practice: 1st. Because it gives only Federal reasons for its decision. 2d. The long line of authorities above cited contradicts such assertion. 3d. The fact that the second count of the petition which states facts calling into operation the State Employers' Liability Act as to the master respondent, and the common law as to the servant respondent was not challenged for misjoinder, either of parties or actions, attests the fact that the Federal grounds only were considered by the Court below.

THE POSITION OF RESPONDENTS IS ILLOGICAL IN THE EXTREME.

The crux of defendants contention is as follows (see p. 5 of their brief in opposition to the petition for writ of certiorari):

The State Court may not permit a joinder of a delinquent servant and a delinquent interstate master in one

action because a round verdict must be rendered and that this has the effect of creating a liability.

This is illogical in the extreme. The State has not by constitution or act of legislature fixed the measure of damages to an injured servant. Neither has Congress fixed such measure of damages. Both Congress and the State have left this to the common law. All that the State has done is to permit a plaintiff in one of its courts as was done at common law, to sue all tort feasors in the same action, and we submit that there is nothing in the Federal Employers Liability Act which deprives the injured servant of an interstate carrier of this right.

This is purely a question of practice, and this Court has in numerous decisions held that the statute deals alone with substantive rights and does not deal with questions of practice leaving those questions to the forum.

See Roberts on interstate employes supra and citations of cases thereunder, which includes Minneapolis R. R. vs. Bombolis, 241 U. S., 211.

It may be well to note in passing, that the requirement for a round verdict against trespassers is not derived from a statute, but is merely an application by the Courts of the rule of common law.

Georgia Code, Section 4512 (see appendix) which provides for apportionment, is the only statutory limitation, and it has been construed by the Georgia Courts to apply only to trespassers upon realty. See McCalla vs. Shaw, 72 Ga., 458, Hunter vs. Wakefield, 97 Ga., 543. Code Section 4513 (see appendix) does give the right of requiring contribution by one who has paid off the judgment, but the rule as to a round verdict in Georgia is derived solely from the common law and not by reason of any statute.

THE COURT BELOW ERRONEOUSLY CONSTRUED THE FEDERAL STATUTE BY CONFUSING THE CAUSE OF ACTION GIVEN TO AN INJURED EMPLOYEE WITH THAT GIVEN TO AN ADMINISTRATOR FOR THE HOMICIDE OF AN EMPLOYE.

If it be possible that we are mistaken as to its attitude, and that the Court below did not intend to hold that the Federal Act was so far exclusive as to suspend the common-law liability of the servant respondent to petitioner, then it necessarily follows that it made just as serious and palpable a misconstruction of the Federal Act by confusing the cause of action given by the statute to the administrator of a deceased employe in cases of homicide and the cause of action arising to an employe who has been injured, but not killed. This clearly appears from that portion of the opinion in which it cites the case of Western and Atlantic R. R. vs. Smith, 144 Ga., 737.

That was a case wherein parents of an **intrastate** servant sued the master carrier and another railroad for his homicide.

The Georgia Employers' Liability Act, Code Section 2782 (see appendix), gives a cause of action **to an injured employe against the carrier master,** and in case of his homicide to his parents, there being no administration.

Under the Georgia Homicide Act, Code Section 4424 (see appendix) the cause of action against the Western & Atlantic Railroad which was **not** the master, was in the mother alone.

Under these conditions the Court properly held there was a misjoinder of plaintiffs because the father had a right of action jointly with the mother only against the employer railroad, and no right of action against the other, while the

mother had a joint action with the father against the employer railroad and a sole right of action against the other railroad. For the same reason there was a misjoinder of defendants.

The citation of the case of W. & A. vs. Smith, indicates that the Court confused the cause of action given to the administrator in a case of homicide with a cause of action accruing to the employe in case of injury.

It is true that if petitioner had been killed and his administrator had sought to sue the carrier and servant respondents in the same action, there would have been a misjoinder of plaintiffs and defendants, just as there was in the case of W. & A. Railroad vs. Smith, because under the Federal Act in cases of homicide the administrator has the cause of action, while under the State Homicide Act (Code Section 4424, see appendix) which applies to the servant respondent, an administrator has no cause of action.

But in the present case the servant petitioner was injured, not killed.

Under the Federal Act he had a cause of action against the master and under the common law he had a cause of action against the servant. **In both cases the measure of damages was the same.** The Federal Act does not prescribe a measure of damage to an injured employe. It leaves that to be ascertained from the common law. The Federal Act does not prescribe the duty of the master to its servant. The act leaves that to the common law which prescribes that ordinary care shall be used not to injure the servant. So that the plaintiff had a cause of action against both respondents for a breach of the same duties flowing from each and the same measure of damages as to each.

It is clear that the Court below so far misconceived the Federal statute as to confuse the rule relating to a deceased employe with that relating to an injured employe.

Note that in the opinion (p. 63 of the record) the Court below said:

> "In the case of W. & A. R. R. vs. Smith, 144 Ga., 737, this Court decided that in a suit under the State law **An employe** (italics ours) of a railroad company could not join as defendants in the same action, the employer company and another railroad company."

This application of the cited case was wholly inaccurate, because the case of W. & A. R. R. vs. Smith was the case of the parents there being no administration, suing for a homicide of their son employe, while the case at bar is that of an injured employe suing for his injuries.

The cited case in stating the case it then had before it begain by saying:

> "A FATHER AND MOTHER (italics ours) instituted an action against two railroad companies for the homicide of their son * * * who had never been married, and **upon whose estate there was no administration.**"

It will be noted that the Georgia Act is identical with the Federal Act, except **that in case of homicide the beneficiaries may sue where no administrator has been appointed and the measure of recovery is prescribed.**

So it is evident that the Court below entirely misconceived the purpose of the Federal statute and evolved the conception that under its terms the same rule applied to an injured employe which applies to his homicide.

Such a conclusion is so illogical that it can hardly be believed that an appellate court could so far misconceive the plain terms of the statute, but necessarily it is true either that

the Court below came to the conclusion that the Federal statute was so far exclusive as to embrace within its terms all the rights of an injured servant against all parties, even suspending the common law liabilities of an offending co-servant, or that it is so far misconceived the purport of the Federal statute as to confuse the cause of action given to an administration of a deceased servant with the cause of action which inures to an injured servant.

THE CASE OF DOYLE VS. ST. PAUL R. R. IS WELL DECIDED AND CONTROLS THIS CASE.

We submit that the case of Doyle vs. St. Paul 159 N. W. 1081; 134 Minn., 461, contains the true rule. The Court there held in terms that there is no misjoinder where a plaintiff joins two defendants in one action, the liability of the one arising upon the Federal Employers' Liability Act and the other upon the common law.

The only difference between the Doyle case and the case at bar is that the master's co-defendant in the Doyle case was a corporation while in the case at bar the master's co-defendant was a servant who, like petitioner, was engaged in interstate commerce.

In both cases the injured servant had a cause of action against each of the defendants, the measure of damages as to each being that prescribed by the common law and the measure of the duty required by each being prescribed by the common law.

The Minnesota case is in accord with the long line of authorities hereinbefore cited, which hold that a plaintiff may proceed against all wrong-doers in one action.

ERRONEOUS CONCEPTION OF THE COURT BELOW AS TO THE IMPORT OF THE FEDERAL STATUTE.

The Court below in conclusion (see pp. 63 and 64 of the record) argues as follows:

> "A conclusion contrary to the one stated above, even if it could be reconciled with the Federal statute, would lead to confusion and injustice. Under our Civil Code, sec 4513, 'if judgment is entered jointly against several tresspassers and is paid off by one, the others shall be liable to him for contribution.' If the carrier and its engineer were jointly liable under the conditions stated in the second question a joint judgment would result against them, and they would be equally bound regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered by each."

This we submit is an erroneous view of the duty of the court, an erroneous interpretation of the act, and affords no justification for the discrimination made against an interstate employee.

It is seen from the Miller case cited and quoted, page 12 hereof and the case of L. & N. R. R. vs. Roberts, 136 Ga. 270, and Sou. Ry. vs. Miller 217, U. S. 209, that these difficulties do not bar the right of an interstate employee to sue his master and any number of servants in the same action.

We submit that under the principles enounced by this Court in the case of Dickinson vs. Stiles, 246 U. S., 631, the Federal Statute only prescribes **the rule of conduct between master and servant leaving the consequences to be determined from the common law** and that the Georgia Courts disregarded these principles and their decisions are directly opposed to the decision of this Court in that case.

This being true, there can be no justification for the discrimination here declared against the interstate employee.

DIFFICULTIES IN DETERMINATION DO NOT JUSTIFY COURTS IN DECLINING JURISDICTION.

The courts cannot decline jurisdiction of a case because of the difficulties attending the trial. This Court in Mondou vs. N. Y., N. H. & H. R. R., 223 U. S. pp. 58 and 59, answering this argument said:

> "We are not disposed to believe that the exercise of jurisdiction by the State Courts will be attended by any appreciable inconvenience or confusion; but be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as to where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."

Besides the difficulties referred to are not such as are recognized by courts. It has always been held that the fact that various defendant tort feasors have different defenses is no objection to their joinder in the same suit. (See quotation from Powers vs. Chesapeake, p. 5 hereof.)

See also A. G. S. R. R. vs. Thompson, 200 U. S. 219, where it is said:

> "The fact that by answer the defendant may show liability is several, cannot change the character of the

> case made by plaintiff in his pleading so as to effect the right of removal."

See also Sou. Ry vs. Carson, 194 U. S. p. 139, where it is said:

> "A separate defense may defeat a joint recovery but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy; and that for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

THAT COURTS MAY NOT APPORTION DAMAGE IS NO GROUND FOR REFUSING JURISDICTION, BECAUSE ALL COURTS (UNLESS REQUIRED BY STATUTE) REFUSE TO APPORTION DAMAGES AMONG TORT FEASORS.

Emphasis is laid by the Court below upon the fact that the jury has no power to specify the particular damages to be recovered of each defendant; but it gives no reason why this fact should operate against the interstate employee and not against other persons.

In the Miller case 217 U. S. 209, as well as other cases cited supra, the verdict was grounded against all defendants without reference to their degree of culpability, yet this Court as well as the Court below held that this fact furnished no cause for misjoinder, and we submit that the Federal statute affords no just cause for this discrimination against an interstate employee.

The fact that a jury cannot apportion, but must render a round verdict is the settled law as to all tort feasors whenever the same has not been changed by statute and affords no ground of misjoinder.

Sutherland on Damages Art. 263, pp. 1531-1532, states the proposition as follows:

> "In a joint action against several for trespass or other tort, if all are found guilty entire or joint damages must be assessed against them. All the legal consequences of being jointly guilty must necessarily follow, of which one is that each is liable for all the damages which the plaintiff has sustained without regard to different degrees or shades of guilt. The jury are to estimate the damages against all the defendants, if guilty, according to the amount which they think the most culpable of them should pay. It is irregular, in such a case, on finding those jointly charged jointly guilty to assess damages against them separately even though they severed in pleading."

In 28 Am. & Eng. Ency. of Law, p. 570, it is said that where wrong-doers are sued jointly, it is the universal rule that the verdict must be in one sum. It must be against all for the highest damage done by one.

In 38 Cyc. p. 492, it is said:

> "Damages may be assessed in a single sum. They cannot be apportioned by the jury among defendants, for the sole inquiry open is what damages plaintiff has sustained, not who ought to pay them. Discrimination according to the relative enormity of the acts of each is not permitted. Should the jury assess different amounts, plaintiff should have judgment against all convicted for the largest sum found against anyone of them, for where no punitive damages are claimed plaintiff is entitled to a joint verdict, for what the most culpable ought to pay."

We submit that the Court below made a wholly erroneous construction of the Federal Liability Act. Under that

act the measure of damages is that prescribed by the common law. The Act gives the right to recover damages, but leaves the measure of damages to be ascertained from the common law. As the action against the servant arose from the common law it follows that the measure of damage was the same as to both.

Likewise the Federal Act does not undertake to prescribe the duty of the carrier employee to its servant, but leaves the measure of duty to be ascertained from the common law; as the action against the servant arose from the common law it follows that the measure of his duty to the plaintiff was the same as the carrier.

So that the Court below was erroneous in its conclusion that there were different measures of damages and different duties from the respective defendants.

It is true that the Federal Act restricts the carriers defense of contributory negligence and assumption of risk, but these are purely defensive matters, and as seen from the cases of Chesapeake R. R. vs. Powers, 169 U. S. 92; Sou. Ry. vs. Carson, 194 U. S. 139; A. G. S. Ry. vs. Thompson, 200 U. S. 218, it is no cause of misjoinder that different defendants have different defenses.

The case of Sou. Ry. vs. Carson, 194 U. S. 136, controls this case.

In that case Carson brought his action against the carrier master and negligent servants. One of the specifications of negligence was that one of the automatic couplers "was not in proper condition which rendered it necessary for plaintiff to go between the cars to effect the coupling, and that the accident thereupon happened by reason of defendants' joint and concurrent negligence, carelessness, recklessness, etc., in particulars detailed."

In the Carson case under the Safety Appliance Act the carrier defendant was deprived of the defense of assumption of risk. The other defendants could make this defense. This Court held that the defendants were properly joined and that the parties defendant were deprived of no Federal right by reason of this joinder, and that this was true even though a round verdict was rendered and the master could not call on the servants for contribution.

For all the foregoing reasons we submit there is no justification for the interpreation placed upon the Federal Liaility Act by the Court below.

JURISDICTION OF THIS COURT.

In their brief resisting the petition for certiorari Respondents denied the jurisdiction of this Court. We assume that the grant of the certiorari adjudicates this question, but if that were not so we think the statement in he case of Andrews vs. Virginia Railroad, 248 U. S. 272, that a case arising under the Federal Employers' Liability Act is a case for certiorari is a sufficient reply to these contentions.

CONCLUSION.

We submit that an interstate employee has the right when injured to sue in State Courts upon the same equality as an intra-state servant and that the Court below deprived petitioner of a valuable Federal right in the discrimination practiced against him, and we submit that because of this error of the Court below, whose decision is in conflict with the practice of the Courts of Georgia and the principles of the common law, its judgment should be reversed.

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APPENDIX.

"2728. Injury by Co-employee. Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband or child, or children of such employee, **and if none then of such employee's parents,** and if none then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment; PROVIDED, nevertheless, no recovery shall be had hereunder if the person killed or injured brought about his death or injury by his own carelessness amounting to a failure to exercise ordinary care; or if he, by the exercise of ordinary care could have avoided the consequences of the defendant's negligence. The measure of damage shall be prescribed in section 4424 and 4425; PROVIDED, that the party or parties for whose benefit recovery may be had under this and the five succeeding sections **may sue and recover in their own name or names in the manner precsribed by section 4424, in case no administration or executor has been appointed at the time suit is filed.** In case death results from injury to the employee, the employer shall be liable unless it makes it appear that it, its agents and employees have exercised all ordinary and reasonable care and diligence, the presumption being in all cases against the employer. If death does not result from the injury, the presumption of negligence shall be and remain as now provided by law in case of injury received by an employee in the service of a railroad company." (Italics ours.)

This section was codified from Georgia Acts 1909, p. 100. The balance of the Georgia Statute as codified is a substantial copy of the Federal Employers' Liability Act.

"4424. Recovery of Homicide When. A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent, and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. **A mother,** or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." (Italics ours.)

"4512. Against Joint Trespassers. Where several trespassers are sued jointly, the plaintiff may recover, against all, damages for the greatest injury done by either. But the jury may, in their verdict, specify the particular damages to be recovered of each, and judgment in such case must be entered severally.

"4513. Contribution. If judgment is entered jointly against several trespassers, and is paid by one, the others shall be liable to him for contribution."